statute has removed the reason for the exception, which, therefore, falls, leaving the general rule in force freed from the exception. But such reasoning seems artificial to the last degree in a question of the interpretation of a statute. Heretofore witnesses could not be compelled to give self-incriminatory evidence. It would seem that if the statute had been intended to change the rule, it would have provided in terms that witnesses could be compelled to give such evidence, more especially since the change was in derogation of a well-settled principle of personal right.[1] The statute is susceptible of a perfectly reasonable construction, leaving the privilege intact, viz., of extending to witnesses voluntarily giving self-incriminatory evidence the same protection that the common law afforded a witness compelled to give such evidence on compulsion against his claim of privilege.

Louis M. Greeley.

CHICAGO, ILL., March 19, 1891.

CONSTITUTIONAL CHECKS UPON MUNICIPAL ENTERPRISE.

"WE have established, we think, beyond cavil," said Judge Miller in Loan Association *v.* Topeka, 20 Wall. 655, 664 (1874), "that there can be no lawful tax which is not laid for a public purpose." This rule possibly narrows the discussion by shifting it from the question what is a lawful tax, to the question what is a public purpose; but the difficulty of application still remains, and is well shown by the case itself which states the rule. That case holds that a law of Kansas authorizing the city of Topeka to encourage by the payment of bounties the establishment of manufactories and "such enterprises as may tend to develop and improve such city," is unconstitutional. Later decisions are to the same effect.[2]

On the other hand, the same court has repeatedly held that

[1] Hare on Discovery, p. 137, citing Orme *v.* Crockford, 13 Price, 376, and other cases.

[2] Parkersburg *v.* Brown, 106 U. S. 487; Cole *v.* LaGrange, 113 U. S. 1.

railroad corporations and "public" grist-mills are proper objects of municipal aid.[1]

It appears, therefore, that the true line of cleavage lies somewhere between a cotton factory and a grist-mill.

Talbot *v.* Hudson, 16 Gray, 417 (1860), Lowell *v.* Boston, 111 Mass. 454 (1873), and the *Opinion of the Justices*, 150 Mass. 592 (1890), when read together, are somewhat perplexing. The ground of decision in each of the first two cases appears to be flatly contradicted by the case itself which follows, and yet one may search the opinions in vain for any recognition of a conflict.

Talbot *v.* Hudson held that a statute authorizing the abatement of a dam on Concord River for the relief of the meadows above was a valid exercise of the right of eminent domain, although the benefit to the owners of the meadows was individual and private, because "the incidental advantage arising from the development of the agricultural resources of so extensive a territory" was public (p. 425).

Lowell *v.* Boston held that the Legislature could not authorize the city of Boston to lend money to the owners of land in the Burnt District for the encouragement of rebuilding, because "the promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object" (p. 461).

In the course of his opinion Judge Wells expresses his approval of the judgment in Talbot *v.* Hudson and of the "general principle upon which it is founded," although it is clear that he has done his best to knock away the single prop, that of incidental public advantage, upon which that case was supported.

The *Opinion of the Justices* holds that the Legislature may authorize cities and towns to manufacture gas and electric light for sale to their inhabitants. The learned justices refer with apparent approval to the proposition laid down in Lowell *v.* Boston: "The essential point is that a public service or use affects the inhabitants as a community and not merely as individuals" (p. 595). Yet it seems quite clear that the sale of electric

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[1] Rogers *v.* Burlington, 3 Wall. 655; Olcott *v.* Supervisors, 16 Wall. 678; Otoe County *v.* Baldwin, 111 U. S. 1; Burlington *v.* Beasley, 94 U. S. 310; Blair *v.* Cuming County, 111 U. S. 363.

light to private individuals, for use in their private houses, affects the inhabitants as individuals, and not as a community.

These perplexities are not referred to for the purpose of throwing doubt upon the cases themselves; but they serve to show how much easier it is to come to a sound conclusion than to write a safe opinion.

It remains to be considered whether there is any principle by which the cases may fairly be reconciled.

Judge Wells, in contending that incidental public benefits could not be regarded, assumed that the right to take property for public purposes, and the right to tax for public purposes, must be subjected to the same tests. He found it necessary, therefore, to deal with the mill acts. Under these acts a riparian owner may erect a mill-dam on his premises, and flood the meadows of his neighbor above, upon the payment of damages to be assessed by a jury. The learned judge contended that this was not an exercise of the right of eminent domain, because "no private property, or right in the nature of property, is taken by force of mill acts either for public or private use." It seems that Judge Shaw and Judge Wells must share the responsibility for the astounding proposition that A can convert B's mowing land into a mill-pond without taking away his property.[1]

It is now settled, however, that the right to flow under the mill acts is an interest in lands.[2]

It follows that these acts do authorize the taking of property, and must be supported, if at all, either as an exercise of the right of eminent domain expressly given, or as a "regulation for the public good" impliedly given, because it is found so inconvenient in practice to get along without it. For, it seems, you may establish a right of way through the constitution by necessity. An interesting exposition of this latter theory is found in the opinion of Mr. Justice Gray in Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9.

It was held in Ryerson *v.* Brown, 35 Mich. 333 (1877), that mill acts similar to those in Massachusetts were unconstitutional, not, however, upon the ground that incidental advantages to the public could not be considered, but upon the ground that before

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[1] Murdock *v.* Stickney, 8 Cush. 116.

[2] Isele *v.* Arlington Savings Bank, 135 Mass. 142; Kenison *v.* Arlington, 144 Mass. 456.

the power of forcible appropriation could be invoked there must appear to be some necessity for its exercise.

Chief Justice Cooley said in that case: "We are not disposed to say that the incidental benefits to the public would not under any circumstances justify the exercise of the right of eminent domain. The rules which underlie taxation do not necessarily govern the case. Taxation is for those purposes which properly and legitimately are designated public purposes; but the authority of the State to compel the sale of individual property for the use of enterprises in which the interest of the public is only to be subserved through conveniences supplied by private corporations or individuals, has been too long recognized to be questioned."

The distinction here suggested seems reasonable. If it had been taken by the court in Lowell *v.* Boston, much trouble might have been avoided. The right of the state to grant a location to a corporation for which the corporation must pay, and its right to subsidize that corporation, do not seem to be necessarily coextensive in principle, and, as juries go now-a-days, they certainly are not the same in effect.

Since it is now settled that a town may be authorized to sell water, gas, and electric light to such of its individual householders as see fit to buy, it is evident that the individuals who make up the community cannot be distinguished from the community in its collective capacity, for the purpose of fixing the limits of taxation. But if a town may sell water and electric light to its inhabitants, why not bread? Is not bread quite as necessary for the "comfortable living of every person" as artificial light? Upon what ground shall it be said that the Legislature may not empower towns and cities to deal in all sorts of commodities which its citizens may need? There seems to be no tenable ground of distinction, except that suggested by Judge Cooley in regard to the exercise of the right of eminent domain; namely, necessity.

The right of the town to perform a given service for its several inhabitants for which its inhabitants severally pay, depends not upon the nature of the thing supplied, nor upon the universality of its use, but upon the mode of supply; upon the economical necessity for organization and system in the performance of the service. The very object of municipal organization is to perform those services for the common benefit, for which organization of some sort, if not political, then voluntary, is necessary. The

right of the town to supply water to its inhabitants by means of individual wells to be dug in individual back-yards has never been asserted. Upon the other hand, if in the progress of the arts it ever becomes necessary for food to be supplied to the householders through pipes, there can be no doubt that towns will be permitted to pipe their streets for the purpose. "In general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and *cannot be successfully dealt with without the aid of powers derived from the Legislature*, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is the interest of each inhabitant that others as well as himself should possess and enjoy them."[1]

In view of the *Opinion* itself, from which this passage is quoted, it can hardly be contended that the qualifications last stated are in every case essential. It cannot be said that each inhabitant, at present, needs the electric light for his own house, or that he is interested in having it for his neighbor's house, except as he is interested in having his neighbor, if he happens to be hospitable, well supplied with wines and cigars. Without these qualifications the rule is sufficiently flexible to enable the State at all times to protect its towns and cities against the exactions of private monopoly, while, on the other hand, public bakeries and dry-goods stores, under existing conditions, at any rate, are fairly barred.

Jabez Fox.

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[1] Opinion of the Justices, 150 Mass. 597.